Supreme Court, U.S.
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No. 00-1559

In The

Supreme Court of the United States

TRAVIS C. HITTSON,

Petitioner,

v.

FREDRICK J. HEAD, Warden, Georgia Diagnostic and Classification Center,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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CAPITAL CASE

QUESTIONS PRESENTED

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A FACT-SPECIFIC APPLICATION OF THE WELL-SETTLED PRECEDENT OF THIS COURT.

II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI WHERE THERE IS NO CONFLICT WITH CIRCUIT COURT PRECEDENT.

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STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Petitioner, Travis Hittson, was indicted by the Grand Jury of Houston County, Georgia, during the May 1992 Term for the offenses of murder, armed robbery, aggravated assault, and possession of a firearm during the commission of a crime. Following a jury trial, Petitioner was convicted of murder, theft by taking as a lesser included offense of armed robbery, aggravated assault, and possession of a firearm during the commission of a crime. (R. 20).[1]

Following the sentencing phase of trial, the jury found the statutory aggravating circumstance that the offense of murder was outrageously or wantonly vile, horrible, or inhuman in that it involved depravity of mind, O.C.G.A. § 17-10-30(b)(7), and imposed a sentence of death on the murder count. (R. 402). Petitioner was sentenced to death for murder, twenty years for aggravated assault, twelve months for theft by taking, consecutive to the twenty year sentence for aggravated assault, and five years for possession of a firearm during the commission of a crime, consecutive to the sentences

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[1] References to the Record on direct appeal from the trial court will be denominated as "R. ___." References to the Trial Transcript will be denominated "T. ___." References to the Sentencing Transcript will be denominated "S.T. ___." References to the Habeas Corpus Hearing Transcript will be denominated "Hab. T. ___." References to Respondent's Exhibits to the habeas corpus transcript will be denominated "Resp. Ex. ___." References to the habeas corpus court's final order will be denominated "Hab. Order, ¶ ___."

imposed for aggravated assault and theft by taking. (R. 406).

Petitioner filed a motion for new trial, brief in support, and supplemental grounds in support, which motion was denied, following a hearing, in an order filed December 7, 1993. (R. 413-415, 429-447, 1303-1364, 1365). The Georgia Supreme Court affirmed Petitioner's conviction and sentence on direct appeal on October 31, 1994, and on December 1, 1994, denied his motion for reconsideration. *Hittson v. State*, 264 Ga. 682, 449 S.E.2d 586 (1994). This Court denied Petitioner's petition for writ of certiorari on May 22, 1995. *Hittson v. Georgia*, 514 U.S. 1129 (1995).

Petitioner then filed his petition for writ of habeas corpus in the Superior Court of Butts County on or about December 31, 1995. Respondent filed responsive pleadings on January 18, 1996. An evidentiary hearing was conducted in this matter on October 6 and 7, 1997.

The habeas corpus court denied Petitioner's state habeas petition in an order filed July 13, 1998. Petitioner filed an application for a certificate of probable cause to appeal on October 13, 1998, which was denied by the Georgia Supreme Court on September 29, 2000. The Georgia Supreme Court granted Petitioner an extension of time to file his motion for reconsideration and, on January 5, 2001, denied Petitioner's motion for reconsideration.

Petitioner has now filed the instant petition seeking review of the decision of the state habeas corpus court applying this Court's well-established precedent, set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to

the specific facts of Petitioner's case and concluding on those specific facts that Petitioner failed to satisfy either prong of the *Strickland v. Washington* test for ineffective assistance of counsel so as to secure sentencing phase habeas corpus relief.

II. FACTS OF THE CRIMES

On April 3, 1992, Petitioner, a crewman aboard a Naval aircraft carrier stationed in Pensacola, Florida, took a weekend trip with his co-defendant Edward Vollmer and the victim, Conway Utterbeck, both of whom were Petitioner's fellow crewmembers. The three men traveled in Vollmer's car to Houston County, Georgia, to spend the weekend at Vollmer's house while Vollmer's parents were out of town. (R. 150). Petitioner, Vollmer, and the victim arrived at the Vollmer residence during the late night or early morning hours of April 3 or 4, 1992. However, when they arrived, the door to the house was locked, and Vollmer had no key. Therefore, the three men spent the remainder of the night in a storage shed behind the Vollmer house. (R. 150).

The next morning, Saturday, April 4, 1992, a friend of the Vollmer family stopped by the house to check things while the Vollmers were out of town and gave a key to Edward Vollmer. (T. 373). Petitioner, Vollmer, and the victim remained around the house during the morning, but late that afternoon, Petitioner and Vollmer left to go drinking. The victim remained at the Vollmer house. (R. 151-152).

Petitioner and Vollmer did not return to the house until the late night hours of Saturday, April 4, 1992, or the

early morning hours of Sunday, April 5, 1992. According to Petitioner, as they were returning to the house, Vollmer told Petitioner that the victim was planning to kill them and was waiting for them at the house with the intention of shooting them, and suggested that they kill the victim first. (R. 152, 164). When they arrived at the house, Vollmer suggested that Petitioner go in first and get the victim into the kitchen. (R. 152, 164-166, 168).

While Vollmer waited outside, Petitioner entered the house armed with an aluminum baseball bat which had been in Vollmer's car. (R. 152, 164-166, 168). Petitioner did not, however, find the victim lying in wait to kill them but instead asleep in the living room, unarmed, in a reclining chair. (R. 152, 167-168).

Despite the fact that the sleeping victim clearly posed no threat to Petitioner and Vollmer, Petitioner struck the sleeping victim in the head with the baseball bat he was wielding, jarring the victim out of the chair. Petitioner then struck the victim again with the bat, this time knocking him to the floor. After the victim was prostrate on the floor, Petitioner struck the victim twice more with the baseball bat, in the hand when the victim reached up, then again in the head, causing the victim to bleed from his head. (R. 167-168). Petitioner then grabbed the victim's hand and dragged him into the kitchen, where Petitioner found Vollmer waiting. (R. 152, 166). The victim was screaming, "Travis, what have I ever did to you," but, according to Petitioner's own account of the crimes, Petitioner remained cold and emotionless in the face of the victim's screams. (R. 152, 166-167).

After Petitioner dragged the victim into the kitchen, Vollmer stepped on the victim's hand and, without speaking, handed a gun to Petitioner. As the victim lay on the kitchen floor, Petitioner shot the victim in the head at close range with a .22 caliber automatic pistol. (R. 152-153, 166-168).

After Petitioner shot the victim in the head, Vollmer removed some money from the victim's clothing, and Petitioner and Vollmer removed the victim's clothes. (R. 153; T. 200). Petitioner and co-defendant Vollmer then left and went to a restaurant to get something to eat. When they returned to the house, they dismembered the victim's body. (T. 200). Petitioner removed one of the victim's hands and began the removal of the victim's head, using a steak knife and a hacksaw. (T. 1540). After they had dismembered the body, cutting off the victim's head, hands, and feet, Petitioner or co-defendant Vollmer skinned parts of the victim's body, including the victim's penis, removed the victim's testicles, and carved out the victim's rectum. (R. 153-155; T. 404).

Petitioner and co-defendant Vollmer eventually wrapped the victim's torso, put the torso in the trunk of co-defendant Vollmer's car, and drove to a wooded area a few miles from the Vollmer house. There, they dug a shallow grave and buried the torso. Petitioner and co-defendant Vollmer then returned to the house, put the victim's head, hands, feet, and remaining body parts in approximately thirteen plastic garbage bags, and placed those body parts in the trunk of the car. They then cleaned the blood from the kitchen and the living room and hid the baseball bat which Petitioner had used to

incapacitate the victim by concealing it in the rafters of the shed behind the Vollmer house. (R. 155-158; T. 207).

After completing the cleanup, Petitioner and co-defendant Vollmer returned to Pensacola with the victim's body parts still in the trunk of the car. They arrived back on base on Monday morning, April 6th, 1992, and reported to work. Following work that afternoon, Petitioner and co-defendant Vollmer traveled to a wooded area outside of Pensacola, where they buried the victim's hands, feet, head, and other body parts in different areas in the woods. (R. 159-161).

The victim's torso was discovered by workers on June 16th, 1992, and the victim's other body parts were recovered in Florida shortly thereafter. (T. 39, 45, 51-53).

The cause of the victim's death was the gunshot wound to his head. However, testimony by the expert pathologist at trial revealed the possibility that the victim remained alive during parts of the mutilation of his body, before dying from the damage inflicted by the gunshot wound. (T. 293-302).

III. THE FULL PICTURE OF COUNSELS' REPRESENTATION

Respondent disputes Petitioner's "Statement of the Case" and many of the factual assertions included in his argument, including Petitioner's claims that he was dominated by his co-defendant; that counsel made errors, particularly errors of constitutional dimension; that counsel failed to work together or were fractured or disorganized; that counsel failed to conduct adequate

investigation; and that counsel failed to provide adequate advice and representation to Petitioner concerning his decision whether to testify. Respondent also disputes Petitioner's representations as to counsels' motivations, actions, strategies, and reasoning with regard to the alleged errors which Petitioner asserts in the instant petition.

Respondent submits that the final order of the habeas corpus court, (Pet. App. 1a-42a), provides a more accurate and objective summary of the facts of counsels' representation of Petitioner. For example, while Petitioner portrays the defense as failing to work together, fractured, and disorganized, Petitioner declines to mention that the understanding of all three of his attorneys was that Mssrs. Holloman and Sammons were to be the defense team and that Mr. Shurling's role was simply to be available to Mssrs. Holloman and Sammons for advice, if needed. (Hab. T. 12-15, 68-72, 90-96, 159-162, 167, 248, 332, 337, 346, 389; Resp. Exs. 1, 2, 12). Similarly, although Petitioner claims that defense counsel never consulted with Petitioner or advised him about executing a waiver before talking with state mental health expert Dr. Storms, this assertion by Petitioner, as well, provides a less than complete picture of counsels' representation with regard to this issue. As the habeas corpus court noted, on the night before the examination, Mr. Sammons met with Petitioner, explained to him that Dr. Storms was working as the prosecution's expert, and warned Petitioner to be aware of that allegiance in responding to Dr. Storms' questions. (Hab. T. 52; Hab. Order ¶¶ 12, 13, and 21, Pet. App. 8a-9a, 11a-12a).

Likewise, although Petitioner suggests that counsels' only rationale for declining to present the testimony of defense mental health expert Dr. Prewett and defense social worker Mary Shults was "to keep the prosecution's experts from testifying," (Petitioner's brief at 12), Petitioner omits that defense counsel additionally wanted to avoid potentially damaging testimony from one of their own mental health experts, Dr. Moore,[2] that they were concerned with whether Ms. Shults would make a good witness before the jury, (Hab. Order ¶¶ 30, 31, 44, 47, 48, and n.3, Pet. App. 15a-16a, 22a, 24a), and that in counsels' assessment considering the entirety of the circumstances, Dr. Prewett's findings would not have been particularly persuasive or mitigating and could possibly have been

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[2] To any extent that Petitioner's observation that Dr. Moore's report did not include the opinion he had shared with defense counsel that Petitioner was "just mean," (Petitioner's brief at 15), may be meant to suggest either that defense counsel fabricated that reason for wanting to avoid expert mental health testimony in Petitioner's case or that there was no danger that Dr. Moore would have testified to that opinion of Petitioner, such suggestions are without support and are in conflict with both the findings of the habeas corpus court on this issue and the overall tenor of Dr. Moore's written report. (Hab. Order ¶¶44, 47, 48, Pet. App. 22a, 24a). Although it is true that Dr. Moore's written expert report did not include the "lay" terminology that Petitioner was "mean," the report did include the comments that Petitioner "was a bum and an alcoholic and joined the Navy rather than go to jail," as well as Dr. Moore's expert diagnosis of antisocial personality disorder (which was without question a potentially aggravating finding), and his findings that Petitioner did not get along very well in the Navy and was considered for administrative discharge and that while Petitioner was not violent when sober, he was hostile and violent when drinking. (Hab. T. 124; Resp. Ex. 5).

damaging to Petitioner. (Hab. T. 36-40, 169, 176, 265, 287; Resp. Ex. 7).

Petitioner continues such questionable representations with his claim that "the habeas corpus court acknowledged that trial counsel failed to conduct an adequate pretrial investigation of [Petitioner's] mental condition." (Petitioner's brief at 14, citing paragraph 45 of the habeas corpus court's order, Pet. App. 23a). This contention collapses with even a casual review of the habeas corpus court's order. While the habeas corpus court acknowledged that trial counsel did not investigate the possible testimony of the court's mental health expert, Dr. Coplin, prior to trial, the habeas corpus court stopped far short of concluding that trial counsel failed to conduct an adequate pretrial investigation of Petitioner's mental condition.[3] (Hab. Order ¶¶ 45, 47, Pet. App. 23a-24a). In fact, as the habeas corpus court noted, trial counsel attended almost the entirety of the two day examination of Petitioner by Dr. Storms (Hab. Order ¶ 12, Pet. App. 8a); utilized two mental health experts of its own, Drs. Prewett and Moore (Hab. Order ¶¶ 16, 43, Pet. App. 10a, 21a-22a); engaged the services of a mitigation specialist who met with Petitioner's family, social worker Mary Shults, (*id.*); and traveled to both Petitioner's home in

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[3] Also, although Petitioner's connected statement, that the habeas corpus court found that trial counsel never interviewed Dr. Storms or Dr. Coplin may be technically accurate, it too is somewhat misleading, since it omits that the habeas corpus court also noted that counsel did make an attempt, following his interview of Petitioner, to probe state's expert Dr. Storms as to his opinions and impressions, but that Dr. Storms was noncommittal. (Hab. Order ¶ 24, Pet. App. 12a-13a).

Nebraska and to the U.S.S. Forrestall, where Petitioner, his co-defendant, and the victim had been stationed, where they interviewed numerous witnesses, 20 of whom were presented in mitigation to establish that Petitioner "was an impressionable, easily led, emotionally needy, and generally harmless guy, who was manipulated and controlled by [co-defendant] Vollmer into doing something he would never normally have done." (Hab. Order ¶¶ 34, 35, 42, Pet. App. 17a-18a, 21a-22a).

In a similar manner, Petitioner's pronouncements that the thirty minute time period during which trial counsel examined the reports of Drs. Storms and Coplin before making the final determination whether to present expert mental health testimony during the defense sentencing phase case-in-chief was "rushed" and "insufficient" declines to note that these reports were not available to trial counsel for their review prior to that time, (Hab. Order ¶¶ 18, 28, Pet. App. 10a-11a, 14a-15a); that Mr. Holloman was familiar with the mental health diagnoses and terminology through his wife's practice as a counselor, (Hab. T. 146); and that during that review, counsel were able to consult with and ask their own mental health expert, Dr. Prewett, any questions they had about the reports. (Hab. T. 27-28, 163, 165, 270-271). Petitioner's assertions regarding counsels' review are also contradicted by the conclusions of the habeas corpus court that this time period was sufficient to review and digest the reports. (Hab. Order ¶ 46, Pet. App. 23a).

Petitioner's suggestion that counsel misinterpreted the reports as potentially damaging is also a distorted account of the facts. Dr. Coplin, the trial court's psychiatric expert, noted in his report that Petitioner had been

arrested three times, that he had been caught stealing money from his mother, that at age sixteen, he burned a large area on his right hand with a cigarette, and that he self-reported having a "quick temper". Additionally, Dr. Coplin found no severe personality disorder. Further, on the same personality test which Dr. Prewett had administered to Petitioner, Dr. Coplin found that Petitioner fit the profile of, among other things, a "psychopathic deviant." (Resp. Ex. 6; Hab. T. 104-105, 153-154). Dr. Coplin's findings also reflected an I.Q. score for Petitioner of ninety three, several points higher than the score found by Dr. Prewett, and within that test, noted that Petitioner scored above average on sequential planning, a fact which would not have dovetailed well with the defense mitigation strategy of painting Petitioner to be a naïve and hapless individual. (Hab. T. 105-106; Resp. Ex. 6). Finally, Dr. Coplin found no evidence of brain damage, a finding which conflicted with Dr. Prewett's suggestion of brain damage. (Resp. Ex. 6). Mr. Sammons did not recall the findings of Dr. Storms to have been particularly helpful or particularly harmful, (Hab. T. 107); however, Dr. Storms' report, too, would have conflicted with the findings of Dr. Prewett at least insofar as Dr. Storms found Petitioner to have an I.Q. score of one hundred five and found no evidence of brain damage.

Finally, the continued assertion by Petitioner that trial counsels' rationale for withholding the testimony of Dr. Prewett and Ms. Shults disappeared when Dr. Storms briefly testified as a lay expert in rebuttal is unsupportable as it ignores the myriad other reasons, some of which are noted above, which counsel had for declining

to present their expert mental health testimony. (Hab. Order ¶¶ 14, 62, Pet. App. 9a, 30a).

Petitioner's representations with regard to the issue of Petitioner testifying at sentencing are equally selective: Petitioner's assertions that Mssrs. Sammons and Holloman "threatened [to] go to the judge" if Petitioner chose to testify, that counsel were openly hostile to the point of almost coming to blows, that counsel had conducted no preparation of Petitioner to testify, and that Petitioner did not understand that the decision whether to testify was ultimately his to make are belied by the full record of testimony of the three attorneys, the trial transcript, and the findings of the habeas corpus court. (S.T. 239, 240, 268, Hab. Order ¶¶ 65-67, 69-71, 79-80, Pet. App. 31a-34a, 37a-38a).

Petitioner's suggestion, which is a cornerstone of his argument in his Question 2, that counsel threatened to withdraw from representation of Petitioner if Petitioner chose to testify is simply unfounded. The only possible basis (and even that one, unsupported) upon which to make such an assertion would be the alleged comment by counsel that they would "go to the judge" if Petitioner decided to testify. First, the habeas corpus court found as factual matter that no such comment was made. However, Petitioner's full assertion regarding the alleged comment, in any event, was, "Mr. Sammons and Mr. Holloman were saying that if I decided to testify, that they were going to go to the judge *and going to write something and say that they had advised me not to.*" (Hab. T. 327, emphasis added). Thus, even if counsel had made the comment alleged by Petitioner, it would be completely unfounded to extrapolate from there that counsel

were threatening to withdraw from representation of Petitioner if he testified since it is clear from Petitioner's claims that all they were saying they would do was perfect the record that any decision by Petitioner to testify was against their advice.

Additionally, Petitioner's insistence that his habeas corpus testimony was uncontroverted to establish that such a comment was made is also problematic. Petitioner's representation that Mr. Shurling "testified only that he could not remember whether such a threat was made," (Petitioner's Brief at 20), provides a less than full picture of Mr. Shurling's actual testimony and of the significance of that testimony to the habeas corpus court's factual determination rejecting Petitioner's testimony that any "go to the judge" comment was made. Mr. Shurling's testimony concerning whether such a comment had been made by his co-counsel arose while Mr. Shurling was responding to questioning about what had occurred in the holding cell when the three attorneys and Petitioner were discussing the issue of whether Petitioner should testify. In the course of his answer, Mr. Shurling volunteered the comment, "I don't remember that part, by the way, in your habeas [petition] where, they may have said it, where they said, 'Well, we are going to bring this up with the Court and object to it on the record if you testify.' I don't recall them saying that. Now, maybe they did. But I swear, I don't recall it." (Hab. T. 379). Clearly, this testimony is something more than simply Mr. Shurling "testif[ying] only that he could not remember whether such a threat was made" as Petitioner would have this Court believe.

Specifically, Petitioner's own testimony places Mr. Shurling in the middle of the action when the comment was allegedly made. According to Petitioner, the comment was made during a time in the holding cell when Petitioner and Mr. Shurling had been having a discussion about whether Petitioner should testify, then Mr. Shurling and one of the other two lawyers began "reflecting back and forth" and "arguing with one another, but then, they would come over and ask, you know, me," and it was at the conclusion of the argument between Mr. Shurling and either Mr. Sammons or Mr. Holloman that Mssrs. Sammons and Holloman allegedly said that if Petitioner decided to testify, "they were going to go to the judge and going to write something and say that they had advised [Petitioner] not to." (Hab. T. 329). Thus, according to Petitioner himself, Mr. Shurling was present, had in fact been having a separate conversation with Petitioner, and was actively involved in the discussions when Mssrs. Sammons and Holloman allegedly informed Petitioner that if he decided to testify, they would go to the judge and write something memorializing that they had advised Petitioner not to testify. In this context, Mr. Shurling's volunteered declaration, "I don't remember that part, by the way, in your habeas [petition] where . . . they said, 'Well, we are going to bring this up with the Court and object to it on the record if you testify.' I don't recall them saying that. Now, maybe they did. But I swear, I don't recall it" is fairly read to be an affirmative but polite statement by Mr. Shurling that, while he hesitates to call Petitioner a liar, he disputes the veracity of that particular allegation, and not simply, as Petitioner would

have it, Mr. Shurling saying that he didn't recall whether the comment was made or not.

Finally, Respondent disputes Petitioner's assertions that Mr. Holloman "obtained [Mr.] Shurling's consent, if at all, by bullying him into submission" (Petitioner's brief at 19) and that Mr. Holloman violated Georgia State Bar Rules. (*Id.* at n.4). In fact, testimony of counsel and Petitioner at the habeas corpus hearing confirms that the attorneys did precisely what the Georgia State Bar Rule cited by Petitioner in his brief to this Court requires, submit their disagreement jointly to Petitioner for his resolution.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI TO REVIEW A FACT-SPECIFIC APPLICATION OF THE WELL-SETTLED PRECEDENT OF THIS COURT.

The decision of the habeas corpus court, which Petitioner now asks this Court to review, is without question a fact-specific application of this Court's "ineffective assistance of counsel" jurisprudence, established in *Strickland v. Washington, supra,* 466 U.S. 668, to the particular facts of Petitioner's case. Knowing that this Court does not exercise its certiorari jurisdiction merely to review a decision of a state court turning upon an analysis of the particular facts involved, *see, e.g., Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437 (1974); *Texas v. Mead,* 465 U.S. 1041, 104 S.Ct. 1318 (1984); *United States v. Johnston,* 268 U.S. 220, 45 S.Ct. 496 (1924), Petitioner seeks to

have this Court exercise its certiorari jurisdiction by suggesting that the Court's recent decision in *Williams v. Taylor*, 529 U.S 362, 391 (2000), is somehow a shift in focus or an alteration of the means by which to properly evaluate counsel's performance in judging a claim of ineffective assistance of counsel.[4]

However, as the *Williams* opinion itself confirms, this Court's well-established *Strickland* test remains the standard for judging claims of ineffective assistance of counsel. As this Court noted in *Williams*, while "the *Strickland* test of necessity requires a case-by-case examination of the evidence," *Williams*, 529 at 391 (quoting *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring), "*Strickland* provides sufficient guidance for resolving virtually all ineffective-assistance claims. . . . " *Id.*

The circumstances which were present in the *Williams* case are not present in Petitioner's case. Unlike in *Williams*, the lower courts in Petitioner's case did not confuse or misapply this Court's ineffective assistance of counsel precedent, requiring this Court to clarify the state of its jurisprudence. Nor do the facts of counsels' representation in the instant case even approach the absence of investigation or preparation in *Williams*, such that *Williams* might be said to control the outcome in the instant case. Further, *Williams* did not alter the *Strickland* test for

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[4] Specifically, Petitioner argues, "*Williams* evinces a move away from accepting the "mere incantation of strategy," and that "[a]fter *Williams*, the question becomes not merely whether trial counsel's decision was strategic but whether the strategic choice justified the acts or omissions of counsel." (Petitioner's brief at 12-13).

evaluating claims of ineffective assistance of counsel but, if anything, reaffirmed *Strickland's* applicability, and the habeas corpus court in Petitioner's case performed its analysis of the facts and circumstances of Petitioner's case by utilizing the test for ineffective assistance of counsel set forth by this Court in *Strickland*.

Therefore, Petitioner's Question 1 in reality asks this Court to grant certiorari merely to examine a fact-specific application of this Court's settled precedent to the particular facts of Petitioner's case and, as such, presents no basis for the exercise by this Court of its certiorari jurisdiction.

II. THIS COURT SHOULD DECLINE TO GRANT CERTIORARI WHERE THERE IS NO CONFLICT WITH CIRCUIT COURT PRECEDENT.

Petitioner asserts that the ruling of the habeas corpus court that Petitioner received effective assistance of counsel in relation to the decision whether to testify conflicts with circuit court precedent which holds that an attorney's threat to withdraw if a client testifies is unconstitutional. However, in order for there to be a conflict between the habeas corpus court's decision in the instant case and the circuit court cases cited by Petitioner, there would have to be a finding that counsel for Petitioner threatened to withdraw if Petitioner testified, and in the instant case, there is neither a finding that any of Petitioner's attorneys threatened to withdraw if Petitioner testified nor even evidence to *suggest* such a scenario.

As noted in Respondent's Statement of the Case, Part C, while Petitioner's assertion that counsel threatened to

withdraw appears to be based on the alleged comment by counsel that they would "go to the judge" if Petitioner decided to testify, even ignoring for the moment that the habeas corpus court found as factual matter that no such comment was made, Petitioner's full assertion regarding the alleged comment was, "Mr. Sammons and Mr. Holloman were saying that if I decided to testify, that they were going to go to the judge *and going to write something and say that they had advised me not to.*" (Hab. T. 327, emphasis added). Thus, there is no support for the present assertion by Petitioner that his attorneys threatened to withdraw if Petitioner testified. Rather, even under Petitioner's version of the facts, rejected by the habeas corpus court,[5] Mssrs. Holloman and Sammons at most stated to Petitioner that in the event that he decided to testify, they would go to the judge and write something down documenting that Petitioner's decision to testify was against their advice to the contrary.[6]

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[5] Even if the habeas corpus court "erred as a matter of law," as Petitioner maintains, by rejecting Petitioner's testimony that counsel said they would go to the judge and document that they had advised Petitioner not to testify, such error would be of no consequence to the decision whether to grant certiorari in this case, since even accepting Petitioner's testimony as fact, a "threat" to go to the judge and document that a client's decision to testify is against the advice of counsel does not equate to a threat to withdraw as counsel if the client testifies, and any conflict with the circuit court cases cited by Petitioner would depend upon there having been a threat by Petitioner's counsel to withdraw if Petitioner testified.

[6] Such perfecting of the record by defense counsel, where the client's decision on the issue whether to testify is contrary to counsels' advice, is neither unusual nor suspect, particularly in a death penalty case, where an ineffective assistance of counsel claim is virtually guaranteed in the event of a death sentence.

Thus, the conflict with circuit court precedent asserted by Petitioner simply does not exist here,[7] and Petitioner's Question 2 presents no valid reason for the exercise by this Court of its certiorari jurisdiction.

Finally, it appears that Petitioner is offering as a "fallback" basis for the grant of certiorari the theory that Mr. Shurling was "bullied" into agreeing with the advice of Petitioner's other two attorneys that Petitioner should not testify and that in such an atmosphere, Petitioner could not be said to have "freely" decided not to testify. However, this "fallback" theory, as well, is dependent upon a version of the facts other than that found by the habeas corpus court and, in any event, seeks to have this Court exercise its certiorari jurisdiction simply to review Petitioner's mere disagreement with the application of this Court's settled ineffective assistance of counsel jurisprudence to the particular facts of Petitioner's case. As this Court has noted, it does not exercise its certiorari jurisdiction merely to review a decision of a state court turning upon an analysis of the particular facts involved. *See, e.g., Ross v. Moffitt, supra,* 417 U.S. 600; *Texas v. Mead, supra,* 465 U.S. 1041; *United States v. Johnston, supra,* 268

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[7] In fact, the Eleventh Circuit case cited by Petitioner, *Nichols v. Butler,* 953 F.2d 1550 (11th Cir. 1992), appears to approve of the action taken and the advice given by Petitioner's trial counsel in the instant case. In *Nichols,* the Eleventh Circuit advised, "of course, counsel should advise his clients in the strongest terms possible if he feels that it would be unwise for the client to testify." *Id.* at 1553. Thus, under that decision, counsels' actions in emphasizing to Petitioner their different viewpoints on the pros and cons of whether Petitioner should testify is both proper and appropriate.

U.S. 220. Thus, Petitioner's "fallback" theory in Question 2 likewise fails to present a basis for the exercise by this Court of its certiorari jurisdiction.

CONCLUSION

For all the above and foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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